
Records Retention

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Records Retention and YOU

- How many of you have responsibilities related to:
 - Retention of Employment Records such as hiring documents, applicant paperwork, records related to employee medical leave, workers' compensation records, termination, promotions, transfers, immigration documents, records related to charges of discrimination

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Records Retention and YOU

- Salary reports, placement data, outside compensation surveys
- Compliance with various state and federal employment laws
- Employment authorization documentation such as I-9 Forms
- Tax reporting - 1099, W-2, 941, making tax payments

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Records Retention and YOU

- Employee Benefits such as 401(k) deferrals, wage reports related to pension or other retirement plan contributions, welfare benefit enrollment forms
- Overtime reports, EEO-1 reports, records required for federal contractors/subs
- Medical flexible spending account or dependent care spending account payments

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Records Retention and YOU

- Payroll records are as varied as your tasks, and include such things as:
 - HR/personnel files
 - W-4s/W-5s
 - I-9s
 - 401(k) election forms
 - Diversity reporting
 - Payroll reports
 - W-2s/1099s
 - Data for generating above
 - Reports on benefits
 - Internal communications/e-mails
 - Time cards

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Records Retention and YOU

- It is important that you and your company are aware of your record keeping obligations under state and federal law.
- Companies are internally benefited by adhering to appropriate record retention policies.
- Recent changes in the law make this topic particularly timely.

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Document Retention and Destruction Policy—Generally

- A records retention and destruction policy is in place to identify, retain, store, protect and dispose of company records.
- Such a policy is necessary to ensure that those responsible for a company's records management adhere to customer, legal and business requirements and that documents are stored or disposed of in a timely and cost effective manner.

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Document Retention and Destruction Policy—Key Questions

- Identify
 - Why do you need the document
- Policy Specifics
 - What
 - Where
 - How long
- How to Retrieve the Records
- Appropriate Destruction Protocols

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Considerations in Developing or Updating Records Retention Policy

- Size of your company and number of employees
- Nature of your business
- Possible litigation concerns
- Who has access to key records and who is responsible for maintenance

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Considerations in Developing or Updating Records Retention Policy

- Statute of Limitations
 - Records needed in connection with lawsuits
 - Audits and other government actions
- Required reporting
 - Internal needs - e.g., determining leave eligibility, calculating pension benefits
 - Enforce contracts
 - Historical reference

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Satisfying Retention Requirements

- Paper
 - Security
 - Microfiche or other media
- Electronic files, backed up
 - Data Integrity
 - Physical Protection of Server
- Outsource to Vendor
 - Indemnification Provisions
 - Continued Security/Privacy after termination of contract for records that cannot be destroyed
 - What happens if you terminate contract early?

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Satisfying Retention Requirements

- Storage and retrieval systems
- Protection against adverse events
 - Electronic - backups, security
 - Physical
 - Unauthorized access
 - Duplicate “vital” records in case of emergency
- Due diligence regarding vendors

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Review and Destruction of Documents

- Systematic and organized periodic review
 - Paper - easy recall of files due for review/destruction
 - Electronic - when is it destroyed?
 - Vendor - ensure compliance?
 - Destroy some forms of documentation, or all?
 - Review files/records of terminating/transferred employees

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Review and Destruction of Documents

- E-mails and other electronic communication
 - Delete ≠ gone
 - Establish guidelines for retention and destruction
 - Limit inbox capacity
 - Backup/print of vital documents

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Records Retention Requirements

- Applicable Statutes of Limitations
 - Most common tax forms, including filed W-2, 1099, 941 - 3 yrs
 - ERISA - 6 yrs
 - ◆ Pension and other retirement benefits, could be longer if looking at wages in an earlier year to formulate benefits
 - ◆ Health/welfare, insured or self-funded? Usually shorter time frame, but still retain
 - COBRA - 6 yrs

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Records Retention Requirements

- Regular Records such as employee information, payrolls, certificate of wage-hour administrator, overtime documentation, employee record, pay schedule information, W-4s, W-5
- Such records should be retained for Four (4) years.

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Records Retention Requirements

- Back up—earnings records, time cards, work schedules, wage schedules, documents related to adjustments/deductions from wages, sales and purchase agreements.
- These documents should be kept for Four (4) years

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Records Retention Requirements

- Employee Benefit Plan Documents such as plan documents, required information to calculate earnings/service if applicable to benefit calculation
- Such records should be retained Permanently.

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Records Retention Requirements

- Other employee benefit plan documents such as election forms, worksheets, calculation forms, beneficiary designation forms, insurance policies, COBRA claims, certificates of creditable coverage, summary plan descriptions, summary annual reports and Forms 5500
- Such records should be kept for Seven (7) years

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Records Retention Requirements

- Records relating to job applications, resumes, or other replies to job advertisements including applications for temporary positions
- All such records should be kept for a period of Two (2) Years from the date the record was made or action was taken for non-employees and for Ten (10) Years after termination of any employee.

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Records Retention Requirements

- Documentation of flexible spending account payments should be kept for Four (4) years
- Correspondence from government agency (IRS, DOL, EEOC, PBGC, DOJ) should be Permanently retained.

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Documents Related to an Employee's Disability

- Any personnel or employment record made or kept by an employer concerning an individual with a disability (i.e. reason for reasonable accommodation, application forms, and other records pertaining to hiring, promotion, transfer, layoff or termination, rates of pay or compensation, and selection for training or apprenticeship)
- All such records should be kept for Ten (10) Years from the date the record is made or the personnel action is taken, whichever is later

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Employer Information Reports (EE0-1)

- Copy of the most recent report filed for each reporting unit must be retained at each such unit or company or divisional headquarters
- Records should be retained for Five (5) Years

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Immigration Reform and Control Act Documents

- Includes I-9 Forms, Employment Eligibility Verification Forms
- Should be retained for Three (3) years after date of hire or one year after date of employee's termination—whichever is longer

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Federal Contractor and Subcontractor Documents

- Written affirmative action programs and supporting documentation, including required workforce analysis and utilization evaluation and other records and documents relating to compliance with applicable EEO nondiscrimination and affirmative action requirements
- Such documents should be retained for at least One (1) year after discontinuation of any policy

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Contracts with Employees

- Contracts with Individual Employees or Contractors, including such things as employment agreements, consulting agreements, golden parachutes or written memoranda or notes summarizing the terms of employment contracts or agreements
- Such documents should be retained for Ten (10) years post termination

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Family Medical Leave Act

- Basic payroll and identifying employee data as related to FMLA leave, dates FMLA leave taken, documentation regarding FMLA eligibility, copies of employee notice of leave, employee request for leave, notes and memoranda discussing such leave, documentation addressing any dispute about FMLA leave
- These records should be kept for a period of Three (3) years.

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Individual Employment Files

- Any information kept in individual employment files including evaluations, promotions, demotions, transfers, reprimands or other discipline
- Such information should be kept for Ten (10) years post termination or separation from employment

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Employee Claims

- Bias and Enforcement Actions-where complaint of discrimination filed, review initiated, or enforcement action commenced, any and all personnel records relating to aggrieved person or all other employees holding positions similar to that held or sought, application forms, test papers, etc.
- Any such records should be kept for Two (2) years after final disposition of complaint

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Litigation Hold

- Notice provided to certain employees regarding preservation of certain documents or types of documents because of possible pending litigation
- Ex: Until further notice, you are to preserve, and are not to delete, discard or otherwise destroy, all documents and all tangible material related to this matter. This obligation includes, but is not limited to, the preservation of all potentially relevant . . .

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“Document” for Litigation Purposes

- “Document” shall mean originals and all copies, unless identical, of all forms of tangible expressions of all materials covered by Minnesota Rules of Civil Procedure, including, without limitation, any written, typed, printed, computerized, recorded, pictorial, graphic or photographic material, however produced or reproduced, formal or informal, whether for internal or external use, including without limitation, correspondence, letters, memoranda, e-mails, facsimile transmissions, drafts, corporate minutes, diary or employment book entries, telephone logs, telegrams . . .

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Recent Changes that Affect Document Retention

- Lilly Ledbetter Fair Pay Act of 2009
- Health Care Reform - grandfathered status

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Ledbetter v. Goodyear Tire & Rubber

Factual Background

- Worked at Goodyear from 1979 until 1998
- Employees raises were based directly on performance evaluations conducted by supervisors
- Ledbetter received poor performance evaluations during her career

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Ledbetter, Factual Background Cont'd

- Following retirement, she claimed that Goodyear violated Title VII and Equal Pay Act because poor performance evaluations were result of sex discrimination and pay was directly affected and set by these tainted evaluations
- Goodyear argued that Ledbetter could not bring claims because statute of limitations on these claims had long since passed

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Ledbetter, Cont'd

- Key Issues
 - Ledbetter did not assert that the Goodyear decisionmakers acted with actual discriminatory intent when they issued paychecks during the EEOC charging period or when they denied her a raise in 1998. Rather, she argued that they paychecks were unlawful because they would have been larger if she has been evaluated in a nondiscriminatory manner *prior to* the EEOC charging period.

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Ledbetter, Cont'd

- Key Issues in the Case
 - “Whether and under what circumstances a plaintiff may bring an action under Title VII alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.”

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Ledbetter, Cont'd

- The Court held that a compensation discrimination charge must be filed within 180 days of a discriminatory pay setting decision
- New violation does not occur, and new charging period does not commence, upon occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination

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Lilly Ledbetter Fair Pay Act of 2009

- Superseded Supreme Court decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc.
- Restores pre-Ledbetter position of the EEOC that each paycheck that delivers discriminatory compensation is actionable under federal EEO statutes, regardless of when discrimination began
- Retroactive to May 28, 2007

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Time for filing:

- When a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- When the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- When the individual's compensation is affected by the application of a discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or practice

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Limits under Ledbetter

- Does not currently apply to discrimination in other terms and conditions of employment
- Does not apply to pension benefits
- Affects only past decisions and actions that affect current compensation
- Likely will not apply if the plaintiff was both aware of an adverse employment action at the time it was taken and of the probability that the action was discriminatory

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How does this affect you?

- Liability and Exposure Under the Act
- Document Retention Policies and Practices
- Potential Impact on other Employment Discrimination Laws
- Retroactive Application
- Effect on systemic discrimination cases

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Example - Pension Benefits Claim

- Claims to have worked 25 years so would be eligible for retirement benefits under plan, hasn't worked there 10 years
- Applied for benefits
- Company doesn't have service records that old, and he is not listed on roster for pension benefit eligibility
- Company denies claim, individual calls DOL, which starts investigation

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Example - Pension Benefits Claim

- Need to have past service and wage records or pension benefits, ERISA Statute of Limitation on actions is 6 years, but he made claims for benefits when he was allegedly first eligible so period may be measured from that time
- DOL and other agencies expect you to have at least minimum necessary records to determine benefits
- Conclusion: don't have to keep records forever, but may have some risk

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Health Care Reform Update - Grandfathered Plans

- Published interim final regulations defining grandfathered plans this week
- In general, most significant design changes will take plan out of grandfathered status
 - This includes changing to new insurance policy
- To be treated as grandfathered, must retain and make available for inspection documentation proving status

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Health Reform Update - Required Coverage of Children to Age 26

- Effective first plan year beginning on or after 9/23/10
- If child has coverage through his or her employer, grandfathered plans need not cover until 1/1/14
- Marital, student, tax dependency status of child irrelevant
- Must charge same amount as to cover other children

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Health Reform Update - Required Coverage of Children to Age 26

- Changes in Tax Code
 - Amounts paid for coverage of an employee's adult child who has not attained age 27 by the end of the tax year (look at age on 12/31) are not taxable income
 - Went to age 27 because knew lots of plans would cover children through end of month/year in which they turn 26
 - Can revise medical flexible spending accounts under 125 plan to allow reimbursement of expenses for these individuals
 - No change to MN law; presumably not taxable since not W-2 income

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Health Care Reform Update - 1099 Reporting

- Under prior law, amounts paid to corporations in excess of \$600 did not need to be reported on 1099; generally only had to report amounts paid to individuals for services
- Health Care Reform law broadened 1099 reporting requirement to include payments to corporations for goods and services
- Will we all be sending 1099s to Costco??

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Thank You

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